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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

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February, 1944.

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The following comments upon respondent's brief may be helpful.

POINT I

THE CLARKE ARTICLE WAS FALSE AND FRAUDULENT.

Although respondent asserts that the Clarke article was true (brief, pp. 10, 43) and suggests that it was not fraudulent, but merely a proper "ghost-written article", the Hartford employee, Hatch, who wrote it, being referred to as "a 'ghost-writer' " (brief, p. 45), the facts which establish its falsity and fraudulent nature are plain.

It was false, because it did not tell the true story of the machines and patents in the glassware industry from 1905 to 1925, as it purported to do. It mentioned only one prior patent, "United States Patent to Homer Brooke, No.

723,983, dated March 31, 1903" (article, R. 170), although there were many others. According to the Hartford brief in the court of appeals, it showed that "the Peiler plunger feeder", (the subject of the Hartford patent) commenced competing in 1917 with the Owens suction machines, and "broke the Owens Domination" (R. 176, 177), which was not the fact. Contrary to the article, the true story of the state of the art, including both the numerous prior patents and the failures of the Hartford Company with its paddle machines until it finally, years after others, installed in November 1922 a plunger feeder, is stated in the opinion of the district court, which was based on the competent evidence in the record, including not only many prior patents but also the testimony of Peiler, the rival inventors, Miller, and Howard, and others.

The article was fraudulent, because Hartford wrote it for the purpose of deceiving the patent office into granting the Peiler patent, by publishing it "under the name of some apparently unprejudiced authority" (Carter letter, R. 42), a labor union official, who was then represented by Hartford to the patent office as a *reluctant witness* (file-wrapper history, V App. Rec. 477). Respondent's brief here (pp. 16, 17) says that there is no evidence that the Clarke article procured the allowance of the patent, and that the article was not mentioned by the patent office (petitioner's main brief did not state otherwise). But although the attempt to deceive the patent office may have failed, Hartford did successfully use the article in the court of appeals in the instant case, by reason of its presence in the patent office proceedings, to achieve the same fraudulent effect it was intended it should have on the patent office tribunals.

In the trial of the infringement suit, the plaintiff, Hartford, did not offer the Clarke article in evidence or make any reference to it. Defendant, Hazel, had nothing to answer. The article was merely a part of the voluminous (754 printed pages) patent office history of the patent, which history was offered by Hartford and properly received to show what occurred in the patent office. There was nothing for Hazel to attack.

But after the trial court had decided for Hazel, on appeal the Hartford brief (R. 176) relied upon the Clarke article and its chart of production curves as showing that the "Peiler plunger feeder", *i.e.*, the feeder of the patent before the court, had broken the Owens domination. To this the Hazel brief replied that the chart ("the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print", Carter letter, R. 41), was "misleading", that it was false because the plunger feeders of others than Hartford had produced most of the gob-feed ware, and that it was "incompetent" (R. 177).

Respondent's brief here (p. 5) says that the substance of the Clarke article was "unchallenged prior to the proceedings before this Court". That is not so. The substance of the article was that the invention by Peiler of a plunger feeder "broke the Owens domination", as stated in the Hartford appeal brief (R. 176). This was denied in the trial court by Hazel, which offered competent evidence to the contrary, and, after the trial court so found, argued the same evidence in the court of appeals in support of such findings.

Respondent's brief here (pp. 4, 17) says that the Hazel brief undertakes to present many matters from the Hazel

infringement suit, and to refer to the proceedings therein, although the record in the Hazel infringement suit is not "before this Court" (p. 17); that "The merits of the patent infringement suit are not involved here, for obvious jurisdictional reasons" (p. 4); that "The filewrapper [of the Peiler patent] is not in this record" (p. 16); and "The Peiler patent is not in this record" (p. 18). But the present proceedings are based on a petition by Hazel to the third circuit court of appeals "upon the proceedings heretofore had" and certain affidavits (R. 5), which proceedings included, of course, both the prior proceedings in that court and in the district court. The appeal record, including briefs, have been certified to this Court and are now before it, the history of the Peiler patent and the patent being Volume V of that record.

The "merits of the patent infringement suit" are involved here, to the extent that it appears that Hazel had substantial defenses, and that the competent evidence in the case, as considered by Judge Gibson in the trial court and Judge Woolley in the circuit court of appeals, contradicted the Clarke article and required decision for Hazel. It is entirely proper for this Court to consider those opinions in connection with the opinion of Judge Buffington and the Clarke article, in deciding whether the article truthfully pictured the feeder situation, and whether the article influenced Judges Buffington and Davis.

There was no disagreement in the court below as to the nature of the Clarke article. The majority said (R. 219) "sordid as is the story concerning the genesis of the Clarke article and the deceptive design and use of its spurious authorship", and Judge Biggs agreed (R. 230 *et seq.*).

POINT II

THE CLARKE ARTICLE BIASED THE COURT AND PREVENTED A FAIR HEARING ON THE COMPETENT EVIDENCE.

This is dealt with in petitioner's main brief (pp. 11-21). Respondent's brief here (pp. 47-53) says that Judge Buffington's "opinion was not based upon the Clarke article" (pp. 49, 52), referring to other matters relied upon in the opinion. But beyond question the opinion was based in large part upon the Clarke article, as clearly appears from the opinion itself. The extent to which it influenced the decision plainly appears from the quotations in petitioner's main brief (pp. 18-20). And, if the Clarke article had nothing to do with the decision of May 5, 1932, why were Hartford and Owens so anxious concerning what Clarke might tell the Hazel investigator, and why did they "follow the matter closely" (Owens letter of May 16, 1932 to Hartford, R. 43) and thereafter pay Clarke because he "felt Hartford was under obligation because of the work he did on the Clarke article, and because he was bothered by investigators" (Hatch, R. 37)?

The Clarke article undoubtedly was a material factor in sustaining the Hartford patent.

POINT III

THE COURT BELOW ERRED IN HOLDING THERE WAS LACK OF DILIGENCE.

The court below held that there was lack of diligence on the part of the Hazel and Shawkee companies, and, as it also held that the public interest was insufficient, refused

to reopen its 1932 decision for this reason as well as supposed immateriality of the fraud and lack of jurisdiction.

1. Respondent's brief here (p. 54) says that during and prior to the trial of the infringement suit Hazel had been told that Hartford had prepared the Clarke article, but did not attempt to prove it at the trial. But in that trial Hartford was the plaintiff, Hartford did not offer or in any way rely upon the article, and there was nothing for the defendant to meet.

After the opinion came down, Hazel promptly endeavored to obtain evidence that Hartford had written the article, of which Hazel then had only hearsay information (Hazel main brief, p. 22, *et seq.*), but was prevented from obtaining anything helpful from Clarke, who, on the contrary, denied what the Woods, lawyers representing interests adverse to Hartford, were willing to say they remembered hearing some years earlier (Hazel main brief, pp. 23, 24).

All that Hazel could have then presented to Judges Buffington and Davis was some hearsay information that Hartford was responsible for the Clarke article, which would have been opposed by the contrary affidavit of Clarke. Undoubtedly such presentation would have been futile. The same court ignored the Shawkee defendants when they later attempted to attack the authenticity of the Clarke article (Hazel main brief, p. 25), their counsel writing Judge Buffington "that the correspondence sent to your Honor * * * clearly shows that the publication of this article in the Glass Budget was instigated by the ingenious brain of Mr. Hatch, one of the plaintiff's attorneys" (R. 84), and in a still later suit in Florida the same attack was ignored by the court (R. 55, 190).

The chances of Judges Buffington and Davis reversing their decision because of what Hazel then knew concerning the Clarke article were practically zero. Their minds had been poisoned so that they were convinced that Peiler of the Hartford Company was a real inventor, as is evident from their opinion. They would have regarded the hearsay affidavits of the Woods, hostile to Hartford, as of little if any weight, compared to an affidavit by Clarke, who undoubtedly would have sworn that he had written the article, as he was then saying to McCarthy, the Hazel investigator (R. 20, 22, 24, 25). And there was the further burden of convincing Judges Buffington and Davis that the article was material to their decision. Their attitude in the *Shawkee* case clearly showed their prejudice towards the Hartford position.

There is no dispute that neither Hazel nor Shawkee had the documentary evidence and oral testimony, produced by the government in the anti-trust trial in the summer of 1941, that the article was written "to obtain claims" in the patent office for the patent in suit (Hartford letter, R. 40), to be "printed under the name of some apparently unprejudiced authority" (Carter letter, R. 42), the other exhibits referred to in the Hazel petition, and the testimony of Hatch concerning his dealings with Clarke after Judge Buffington's opinion (Hazel main brief, p. 26).

2. Respondent, in addition to denying that there was diligence on the part of the Hazel and the Shawkee petitioners, says also that the patent infringement decisions which Hartford obtained against them can not be set aside because of their "elections", which seems to us is merely another way of saying that they were not diligent.

With respect to Hazel, the Hartford brief asserts as its Fourth Point "Petitioner is barred from seeking the relief for which it petitions, by its own election to settle its controversy with respondent", etc. (brief, p. 67). In Hartford's brief answering the Shawkee petitioners, the Fourth Point is "Petitioners are barred by their own election from seeking relief" (p. 26). In both cases, the underlying argument is the same, namely, that the petitioners elected to abide by the respective decisions against them and, therefore, notwithstanding the new evidence, should not be permitted to ask relief from those decisions.

3. In connection with its lack of diligence and election points, the Hartford brief refers to a 1932 cross-license agreement between Hartford and Hazel (brief, pp. 21, 56, 68), and matters related to it, although they are not pertinent to the issues in the present proceeding, which is directed solely to the 1932 judgment of the circuit court of appeals sustaining the Hartford patent. The only question is whether that judgment should be set aside. If not, it will stand on the records as very strong evidence that the Hartford Company contributed much to the practical industry of glass container manufacture, contrary to the fact.

Respondent's brief here says that Hazel received large amounts from Hartford under the license contract (brief, p. 68), but, in consideration of this Hartford and its licensees under the contract were receiving the benefit of the use of the Hazel inventions, engineering "know-how" etc., and respondent does not assert that these were not substantial nor even that Hartford paid for more than it received.

The nature of the 1932 Hartford-Hazel cross-license agreement, the way it actually worked out in practice, the rights and remedies of the parties concerning it and such related matters have simply nothing to do with the basic questions presented to this Court in the Hazel and Shawkee cases. Those questions are: was material fraud practiced on the third circuit court of appeals; has it power to correct such fraud after the term has expired; and was there such diligence in presenting new evidence by Hazel and Shawkee as warranted relief; or, in the absence thereof, should the court of appeals have so acted in the public interest.

POINT IV

THE COURT BELOW SHOULD HAVE SET ASIDE ITS JUDGMENT ALTHOUGH THE TERM IN WHICH IT WAS ENTERED HAD EXPIRED.

Respondent's brief (pp. 22 to 42) discusses several matters which are wholly irrelevant, it seems to us, to the basic question here presented.

That question is whether an *appellate* court, by a proceeding instituted in it, can set aside its judgment for fraud practiced on it, after the term has expired. There is no doubt that a *trial* court can do so, *U. S.* v. *Throckmorton*, 98 U. S. 61 and *Marshall* v. *Holmes*, 141 U. S. 589.

Respondent says that the court of appeals "lost all jurisdiction of the case and had no further control over its mandate or power to recall it" after the term expired (brief, p. 25). But it had precisely the same power as has a trial court, after its term has expired, to reopen the case for fraud shown, because an appellate court has the same

powers with respect to its appellate functions as does a trial court with respect to its trial functions. The statutes provide that

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law" (28 USCA 377; R. S. Sec. 716).

Respondent is wrong in saying that "The court below, being solely of appellate jurisdiction, has no power to consider an original bill" (brief, p. 29). It has such power, to aid or prevent the impairment of its appellate jurisdiction, precisely as has this Court.

In *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, this Court considered an original petition to it for an injunction to preserve the status pending appeal to it, which was heard by this Court upon an order to show cause, and held that it had power to issue the injunction. The injunction was not issued, because of the showing made by defendants in their answers, but there can be no doubt that if this Court had been dissatisfied with the facts so presented, it had the power to refer the case to a master to ascertain the facts and report to it. In the case of *In Re Baiz*, 135 U. S. 403, this Court pointed out that applications to it for writs of prohibition or writs of mandamus may be disposed of by a rule to show cause upon affidavits, but, if not, then "a traverse of the return [to the writ] was allowed, issues were made up and a trial had" (p. 431). This Court in that case permitted new evidence, not before the lower court, to be introduced, "the petitioner being afforded, as he was, the opportunity for

explanation and the introduction of such other evidence as he chose to produce" (p. 431).

In *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, the seventh circuit court of appeals issued an injunction against the prosecution of a suit in another circuit, and this Court affirmed. The same arguments as are made here were made there, namely, that "the Circuit Court of Appeals is a court of purely appellate jurisdiction" (p. 413), but this Court overruled that contention, stating that "Under § 262* of the Judicial Code, that court had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction" and that "it had jurisdiction to determine whether the filing and maintenance of the bill was in contempt of its jurisdiction" (p. 426).

In the *Art Metals* cases, 2 Cir., 107 F. 2d. 940 and 944, the proceeding was an original one in the circuit court of appeals, to set aside a judgment after its term had expired, the judgment was set aside, and this Court denied certiorari, 308 U. S. 621. In that case the judgment was voidable, because one of the judges was biased by money. In the present case, the judgment is also voidable, because two of the judges were biased, by fraud practised on them. Respondent says that the *Art Metals* judgment was void and as though "no judgment had been entered". (brief, p. 32), but totally ignores the authorities cited in petitioner's main brief (p. 33) that such a judgment is only voidable, and fails to cite any contrary authority.

Respondent says that a bill can be now filed in the district court, to set aside the judgment, and that such is the procedure for petitioner to follow. But obviously such bill

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*28 U. S. C. A. 377, *supra*, page 10.

would be futile now, because it would have to be based on the materiality of the Clarke article, on the diligence of petitioner and on the public interest, all of which the court of appeals has already decided against petitioner. It would be a vain proceeding. And, of course, whether or not a suit could be filed in a district court to remedy a fraud practiced on its court of appeals, certainly there should be no doubt of the latter's power to undo what it had been fraudulently persuaded to do.

Respondent's brief (p. 35, *et seq.*) says that the questions involved are such that the court of appeals should not decide them on affidavits, and that a court of appeals can not call witnesses. But that is a matter of procedure for the court of appeals to decide. The burden is upon the moving party to satisfy the court that action should be taken. In the present case, the record has been made and is now before this Court, as it was before the court of appeals. The present question is simple, namely, whether upon the record here made, the early judgments sustaining the Hartford patent should be set aside.

Courts in the exercise of their appellate jurisdictions, including, of course, this Court, are not barred by the lapse of time, from correcting judgments obtained by fraud upon them.

CONCLUSION

This is a simple case.

Hartford concocted a spurious article which it had published under the name of an apparently disinterested authority on glassmaking patents and machines. The article was submitted with such representation to the patent office,

which thereafter issued the patent. The patent office proceedings do not show to what extent, if any, the article influenced the patent office's decision.

The article was in the record of a patent infringement suit brought by Hartford, as a part of the patent office history, but was not itself offered in evidence or referred to at the trial. Hartford losing in the trial court, its brief on appeal for the first time in the case cited the article as authority, and the majority of the appellate court accepting it as such, ignored the competent evidence on which the trial court had found against Hartford, and reversed the trial court.

That this was fraud cannot be doubted.

Petitioners here, Hazel and Shawkee, both had been told that Hartford and Hatch were responsible for the article, but did not have proof of such fact until 1940, when the government produced it at an antitrust trial, and they immediately thereafter presented it to the court of appeals. They were diligent, but even if not, the court of appeals of its own motion can set aside its judgment obtained by fraud practiced on it, not only to protect its jurisdiction, but because of the public interest.*

Does the expiration of a term of court leave an appellate court powerless to correct a patent or other decision

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*Judge Buffington's opinion that Hartford invented the plunger feeder should not be allowed to stand. It has already misled another court into granting Hartford other patents which run to 1954. *Hartford* v. *Cox*, 87 F. (2d) 741 (Ct. App. D. C.), quoting with approval Judge Buffington's references to the Clarke article (p. 743). In patent litigation "the public has rights also." *Densmore* v. *Scofield*, 102 U. S. 375, 378, which "can never be made to yield to schemes of selfishness or cupidity." *Kendall* v. *Winsor*, 62 U. S. 322, 328. There must be considered "the adverse effect upon the public interest of a successful infringement suit." *Morton Salt* v. *Suppiger*, 314 U. S. 488, 494.

resulting from fraud worked on it? To state the quest
is to answer it. Courts would be sorry things if that w
true, and it is not. Appellate courts have complete jur
diction with respect to their appellate jurisdiction—they
full armored with all writs "which may be necessary for
exercise of their respective jurisdictions" (28 USCA 37
Any court of equity, not only trial courts but appell
courts, may reopen judgments for fraud after the term h
passed (*Throckmorton*, *Marshall* and *Art Metal* cases).

The decision below should be reversed.

Respectfully submitted,

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February, 1944.